

RAYMOND PAGE,)	AGBCA No. 2001-152-1
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Appellant)	
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Representing the Appellant:)	
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Representing the Government:)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

August 8, 2002

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge VERGILIO.

On May 29, 2001, the Board received this appeal from Raymond Page, of Cedarville, California (purchaser). The respondent is the U. S. Department of Agriculture, Forest Service (Government). The purchaser on the Larry Flat Salvage Timber Sale, contract No. 052163, in the Warner Mountain Ranger District of the Modoc National Forest, outside of Cedarville, California, disputes the Government's claim to recover \$60,302.46 under the failure to cut provision of the contract, when the Government did not resell the timber after the contract terminated uncompleted.

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. ' ' 601-613, as amended. A hearing on the merits was held on February 5, 2002. The evidentiary record consists of the supplemented appeal file and the hearing transcript. Each party has submitted a brief.

The purchaser acknowledges that it did not complete performance by the termination date of the contract. However, the purchaser alleges a variety of Government improprieties which should exonerate it from the damages provision. The purchaser maintains that the Government acted

improperly by not extending further the time for performance, particularly given that the Government permitted the contractor to perform at a slower rate than identified in the purchaser's plan of operation. Further, it alleges that by terminating the contract, the Government failed to act in the Government's best interests. Also, the purchaser contends that the Government failed to mitigate damages when the Government did not complete a resale and incorrectly concluded that the purchaser would not sign a road use agreement to provide access to the contract site. Further, the purchaser asserts that its liability under the contract for failure to cut should be limited to the amount of its performance bond (or equivalent) and the costs for the Government to complete some specific work. Thus, the purchaser seeks to reduce its liability to \$10,400, at most.

The record reveals no Government impropriety. The purchaser's pace of performance and inability to complete the contract by the termination date are not the fault of or attributable to the Government. The record does not demonstrate that the purchaser was entitled to additional time for performance. The Government properly invoked the Failure to Cut clause.

The failure to cut provision dictates that in the event of a purchaser's failure to cut and remove timber, if a resale does not occur, the Government is entitled to damages calculated using a given formula. The contractor failed to cut and remove timber. A resale did not occur. The Government determined the value of the remaining timber and its damages in accordance with the dictates of the clause. The Government is entitled to the relief it claims. The Board denies the appeal.

FINDINGS OF FACT

The prospectus and contract

1. On April 25, 1996, Raymond Page (as owner/permittee) and the Government (as the permittee) entered into a Road Use Agreement under which the permittee allows the Government and its contractor to use and maintain truck roads, over and across described lands, for logging purposes associated with the Larry Flat Salvage Timber Sale (Exhibit C at 94-95) (all exhibits are in the appeal file).

2. After two attempted sales failed to produce a bid satisfying the minimum price, the Government readvertised (with an again reduced minimum price) the Larry Flat Salvage Timber Sale for an estimated 8,101 green tons of wood fiber in the Modoc National Forest, in the Warner Mountain Ranger District, in California (Exhibits C at 106-23, D at 148 (& 1)). Pursuant to the terms of the prospectus, after receiving sealed bids on November 1, 1996, the sale was completed with an oral auction. The minimum permitted price, based upon the advertised rate of \$2.67 per green ton for the estimated total quantity of product of 8,101 tons, was \$21,629.67. The oral auction raised the price from Mr. Page's initial (written) bid of \$21,710 .68 to his winning bid of \$100,000. (Exhibit C at 127-41).

3. The contract, No. 052163, with an award date of November 20, 1996, like the prospectus, specifies a normal operating season covering the period between June 15 and October 15, with a contract termination date of March 31, 1998. The contract, like the prospectus, requires the contractor to submit to the Forest Service a general operating plan showing how the purchaser plans to complete the contract by the termination date. (Exhibits B at 8, 15, C at 109 (& 5).) The prospectus states: "Extensions of this contract may be granted only when the purchaser has met specified conditions." (Exhibit C at 109 (& 5).) The contract contains a general provision, captioned "Operating Schedule":

Purchaser shall, before commencing operations, provide in writing an annual schedule of anticipated major activities and needs for logging Included Timber, such as logging, road maintenance, Scaling, and construction, including construction and staking schedule under B5.212 and material delivery under B5.22. Upon reasonable notice to Forest Service, such schedule shall be subject to modifications necessitated by weather, markets or other unpredictable circumstances.

Subject to B6.6 and when the requirements of B6.65 are met, Purchaser's Operations may be conducted outside Normal Operating Season. "Normal Operating Season" is the period beginning and ending on the dates stated in A20 of any year.

(Exhibit B at 30 (& B6.31).) (The provisions referenced in the quotation are not pertinent to the resolution of this appeal.) This general provision is supplemented by a special provision:

PLAN OF OPERATION. (7/86) Within 60 days of first normal operating season, Purchaser shall furnish Forest Service a written general plan of operation which shall be in addition to the annual operating schedule required under B6.31. The plan shall set forth planned periods for and methods of road construction, timber harvesting, and completion of slash disposal, erosion control measures and other contractual [sic] requirements. Forest Service written approval of the plan of operation is prerequisite to commencement of Purchaser's Operations. Purchaser may revise this plan of operations when necessitated by weather, markets or other unpredictable circumstances, subject to the written approval of Forest Service. In the event of delays beyond the control of Purchaser which qualify for Contract Term Adjustment, the plan of operations shall be

mutually adjusted as necessary to accommodate the adjusted contract period.

(Exhibit D at 52 (& C6.3).)

4. Published Forest Service regulations circumscribe the actions of a contracting officer who considers extending the time to complete a timber sale contract:

The term of any contract or permit shall not be extended unless the approving officer finds:

(a) That the purchaser has diligently performed in accordance with contract provisions and an approved plan of operation; or

(b) That the substantial overriding public interest justifies the extension.

(36 CFR 223.115 (1997).)

5. The contract contains a Contract Term Extension clause which defines Acontract term extension@ to mean an extension of the term of the contract at the request of the purchaser other than contract term adjustment (Exhibit B at 71 (& C8.23)). The Conditions for Contract Term Extension clause identifies the conditions, all of which are to have been met at the time of the request for an extension. The five conditions include that at least 75% of estimated volume has been cut and removed from the sale area, and the purchaser=s operations to date have been in reasonable compliance with contract terms and the approved plan of operation. (Exhibit B at 72 (& C8.231).)

6. The contract contains a Failure to Cut clause:

In event of (a) termination for breach or (b) Purchaser=s failure to cut designated timber on portions of Sale Area by Termination Date, Forest Service shall appraise remaining Included Timber, unless termination is under C8.2 or B8.22. Such appraisal shall be made with the standard Forest Service method in use at time of termination.

Damages due the United States for Purchaser=s failure to cut and remove Included Timber meeting Utilization Standards shall be the amount by which Current Contract Value, plus costs described below, less any Effective Purchaser Credit remaining at time of termination, exceeds the resale value at new Bid Rates.

If there is no resale, damages due shall be determined by subtracting the value established by said appraisal from the difference between Current Contract Value and unused Effective Purchaser Credit, plus any of the following applicable costs

(Exhibit B at 75-76 (& C.4).) In setting forth the damages due, this clause does not limit the purchaser's obligations to the amount of the performance bond, which is to serve as a further guarantee of the faithful performance of the provisions of this contract by the purchaser (Exhibit B at 15 (& A21), 36 (& B9.1)). Here, the performance bond was in the amount of \$10,000 (Exhibit C at 155-56), subsequently replaced by irrevocable letters of credit (Exhibit D at 223-24, 234-35).

Performance

7. With a signature and date of May 10, 1997, the purchaser provided its plan of operation. The plan indicates that with a contract logger, the purchaser will harvest the eleven units comprising the sale beginning on June 2, 1997, with a completion date of October 20, 1997. Four units are to be harvested by August 1, five units between August 1 and September 30, and two units between August 20 and October 20. The Government approved the plan with a signature and date of May 19, 1997. (Exhibit D at 157-58.)

On May 22, 1997, the purchaser submitted, and the Government approved, the annual operator's schedule. The schedule indicates that the purchaser expects to begin falling trees on June 9, 1997, and hauling trees on June 11, 1997. The schedule states that the purchaser intends to use two trucks, and estimates four to six loads per day per truck. (Exhibit D at 164-72.)

8. By letters dated July 14, 1997, the purchaser requested an adjustment to the contract termination date and to the periodic payment date, because of days lost due to wet ground. The purchaser states that the contract starting date is June 15, but it was not able to start logging until after July 13. (Exhibit D at 182-83). By letter dated July 16, 1997, the contracting officer approved the requests:

The request for these adjustments, for the lost time from June 15, 1997 (beginning of the normal operating season) through July 13, 1997, is approved.

The new termination date is July 12, 1998.

The adjusted periodic payment determination date is August 23, 1997.

(Exhibit D at 184.)

9. In mid-July the purchaser began work. By October 15, 1997, the end of the normal operating season, the purchaser had not cut and removed all materials. Rather, it had worked only three of the eleven units, completing but one of the units, and doing partial work on two units. (Exhibit D at 192, 194-96.)

10. By letter dated October 31, 1997, the Government requested that the purchaser provide a revised general operating plan. The letter specifies that the plan is to address how the purchaser intends to complete the sale within the time frame remaining on the contract, with its revised termination date of July 12, 1998. (Exhibit D at 185.)

11. In a letter dated May 6, 1998, the purchaser informed the Government that the purchaser's lumber mill

has been experiencing a cash flow problem. This has hampered our ability to finish the Larry Flat Sale in a timely manner. As you may know we have tried to enter the lumber mill business at a time when the competition is very fierce. In our attempt to keep the last full sized lumber mill in Modoc County from being dismantled and scrapped, we have attempted to focus on salvage timber. We have been groping for ways to utilize trees of inferior quality and in less quantity with a greater product mix than the typical lumber mill of the past fifty years. Like the steam locomotive, we need time to gain speed.

We are asking to re-negotiate our existing contract, not change the price we paid per ton, but mainly the element of time. Could we have an extension?

(Exhibit D at 188.) The purchaser contends that it was a practical impossibility to complete performance within the extended period in 1998 (Transcript at 177.)

12. By letter dated May 22, 1998, the contracting officer responded to the letter, denying the requested contract term extension. The letter specifies that the purchaser had failed to satisfy a prerequisite to such an extension (& C8.231), namely, the purchaser had not cut and removed 75% of the estimated timber volume. Further, the letter states,

There is no contractual basis for granting an extension of time based upon your experiencing a cash flow problem.

While I understand your dilemma, I cannot reform the contract to meet your needs. To do so would be changing the original contract premise and would subject the government to claims from prospective Purchasers who might have bought the sale under different conditions. Specifically, had another purchaser known they could receive an extension after removing only 35 percent of the volume estimated in A2, they may have bid differently.

(Exhibit D at 189.)

13. The purchaser sought an extension by letter dated July 6, 1998, noting that it has been unable to go into the project area because the area has been too wet. AIt would be our hope that the extension could be until the end of this logging season as it appears thunder showers may continue throughout the summer.@ (Exhibit D at 190.)

14. In a letter dated July 7, 1998, the contracting officer states: AYour request is based on your inability to operate the sale due to wet ground conditions between June 15, 1998 (beginning of the normal operating season) and July 12, 1998, a period of 28 calendar days.@ The contracting officer granted a contract term adjustment for the time lost during the normal operating season, such that the new termination date became August 9, 1998. (Exhibit D at 191.)

15. Despite the specific written request from the Government (Finding of Fact (FF) 10), the purchaser did not provide an updated plan of operation or schedule or explain how it could or would complete performance within the contract period; the purchaser concluded that it could not complete performance by the termination date. (Transcript at 157-58, 193).

Termination and aftermath

16. By letter dated August 10, 1998, the Government informed the purchaser that the contract terminated at the close of business on August 9; not all included timber was removed. Of eleven units, only one is identified as completely logged with timber removed. AUnder these circumstances the Forest Service will begin the procedures outlined in C9.4 - Failure to Cut (4/82) to determine damages due the United States.@ (Exhibit D at 192.) The purchaser had removed approximately one-third of the material of the sale (Exhibit D at 194, 201; Transcript at 177).

17. The contracting officer testified that it would not have been in the best interest of the Government to extend the time of performance. Given the performance during the first season, with the purchaser not performing at the rate envisioned in the schedule, he believed that the purchaser was not capable of completing performance (Transcript at 135-38).

18. The Government appraised the remaining timber (5,487.03 green tons), and arrived at the overall average price of \$1.36 per green ton. (Exhibits D at 194-99, 201, I; Transcript at 9). The Government maintains that the appraisal was conducted in accordance with its procedures. The price per green ton--lower than the earlier appraisals on this sale--is said to be consistent with indices of wood prices which were lower than those at the time the original sale was appraised. (Transcript at 9-15.) The record reveals no inconsistency with appraisal procedures; the decline in the appraised price is consistent with the testimony of the purchaser that the lumber market peaked at about the time of the bid, and declined thereafter (Transcript at 174-75).

19. On October 22, 1998, the Government had published a notice of the resale; the Government would conduct an oral auction, with initial bids to be received on November 20, 1998 (Exhibit D at 202).

20. The prospectus for the resale specifies that regulations prohibit consideration of a bid for the resale from the previous purchaser or from any person currently affiliated with the previous purchaser (Exhibit D at 203).¹ The Government did not make a determination that its acceptance of a bid by the purchaser would be in the public interest. The record does not indicate that the purchaser submitted a bid on the resale (prior to its cancellation), sought a public interest[@] determination, or protested or otherwise timely objected to its exclusion from the resale. The contracting officer would not have found it to be in the Government's best interests to permit the purchaser to compete in the resale (Transcript at 139).

21. On November 19, 1998, the Government had published a notice of cancellation of the sale (Exhibit D at 217). The Government canceled the sale because Mr. Page did not consent to providing access over his property; that is, prior to November 20, he did not

¹ The regulation (36 CFR 223.86 (1997), Bid restriction on resale of noncompleted contract), specifies that, in a resale, after there has been a failure to cut designated timber by the termination date, the Government will not consider a bid from a purchaser or affiliate who failed to complete the original contract unless acceptance of such bid is determined to be in the public interest.[@]

extend the ARoad Use Agreement@ (FF 1) so as to permit a new purchaser to log the sale area. (Transcript at 93-94,160, 179-80, 187-88.)

22. The Government assessed its damages at \$60,702.46, of which \$60,302.46 represents the difference between the contract price for the uncut timber and the appraisal price, and \$400 represents the cost to complete other contract work (to pile two landings). As noted above (FF 18), the Government determined that 5,487.03 tons of timber remained. The contract price for this timber was \$67,764.82; the appraised value of this timber (at \$1.36 per ton) was \$7,462.36. Of the damage total, the Government contends that it has \$30,999.01 of unobligated cash on hand from the purchaser's deposit and letters of credit accepted in lieu of the performance bond . The Government maintains that an additional \$29,703.45 (\$60,702.46 - \$30,999.01) is due from the purchaser. (Exhibit A at 5-7.)

23. On May 29, 2001, the Board received the appeal from the purchaser.

DISCUSSION

The purchaser recognizes that it did not complete the contract by the termination date (as extended). The purchaser states that several circumstances beyond its control prevented timely completion. Moreover, it maintains that the Government acted improperly by not questioning the rate of logging until the end of the season, by not granting an adequate time extension, and by not permitting the purchaser to bid on the resale (which was canceled before bids were opened). The purchaser summarizes a portion of its position by stating that the Government has failed to prove that the purchaser damaged the Government (which still owns the remaining timber). Further, it asserts: AThe purchaser did not do anything dishonest or illegal to the government. Any assessment above \$10,400 [representing the posted performance bond of \$10,000, and \$400 for two landings that remained to be cleaned up] would be punitive and unjust.@ (Purchaser's Post-hearing Brief.)

A starting point for the analysis is the contract. The Failure to Cut clause (FF 6) specifically allocates risks and identifies obligations and liabilities in the event that timber is not all cut by the termination date. Precedential decisions by the U. S. Court of Appeals for the Federal Circuit establish the scope and reach of the Failure to Cut clause.

Agreed-upon contract terms must be enforced. As stated by our appellate authority, regarding a similar failure to cut clause:

The agreed-upon contract term, i.e., that the government is entitled to recover damages in the event there is no resale for whatever reason including that it chooses not to resell the timber, must be given effect. Madigan v. Hobin Lumber Co., 986 F.2d 1401, 1405 (Fed. Cir. 1993). The contract does not require the Government to conduct a resale to mitigate its damages: Even if mitigation is normally required, the parties in this case effectively agreed, by incorporating the no-resale clause in the contract, that the government did not have a duty to try to resell. Madigan, 986 F.2d at 1405. Accordingly, we conclude that the agreed-upon contract term, providing that the government is entitled to damages and providing the method of calculating those damages in the event that the government does not resell the timber, must be enforced in this case in accordance with the general principles of contract law and established precedent. Madigan, 986 F.2d at 1405-06.

In reviewing a similar clause, our appellate authority has stressed that the clause defines what the Government is to do when invoking the clause:

The terms of section B9.4 make it clear that the only appraisal to which [the purchaser] was entitled was one that complied in all material respects with the standard Forest Service method in use at [the] time of the termination of the timber contract. [The purchaser] was emphatically *not* entitled to a fair appraisal, an accurate appraisal, a reasonable appraisal, or any manner of appraisal other than the one indicated in section B9.4. Under section B9.4, compliance with the standard appraisal method is the sole measure of its accuracy and reliability.

Hoskins Lumber Co. v. United States, 89 F.3d 816, 817 (Fed. Cir. 1996).

One needs to analyze the purchaser's claim in light of the contract language and legal precedent. First, in order to assess damages, the Government must have properly concluded that the Failure to Cut clause was applicable. Then, if the Government demonstrates entitlement under the clause, one must examine if the Government's appraisal and calculations are in accordance with the clause. Thus, many of the concerns of the purchaser are secondary or not controlling given the dictates of the court, which provide the framework for the analysis.

Entitlement

The purchaser did not complete performance by the termination date. However, the purchaser raises various bases in its attempt to demonstrate that the Government could or should not have invoked the clause. Having reviewed each allegation, as detailed below, the Board concludes that the purchaser has not satisfied its burden of proof; that is, the facts and law do not ensure the purchaser that its performance period would be lengthened beyond that provided by the Government.

The prospectus and contract identify a termination date (FF 3). The termination date constitutes an enforceable term of the contract; the Failure to Cut clause (FF 6) details the consequences of a purchaser's failure to complete performance by the termination date. A plan of operation is to reveal the purchaser's schedule to ensure performance within the contract period. Modifications to the plan (under B6.31 and C6.3), necessitated by weather, markets, or other unpredictable circumstances, do not contemplate a change in the termination date except for delays beyond the control of the purchaser which qualify for contract term adjustment (FF 3). As detailed in regulation, absent specific findings, a contracting officer shall not extend the term of the contract (FF 4). A purchaser cannot expect reasonably that the Government will extend a termination date when the purchaser does not perform at its proposed rate. Here, the contracting officer reasonably concluded that the conditions were not satisfied to support an adjustment beyond the two given or an extension (FF 8, 12, 14, 17).

The purchaser faults the Government for permitting the purchaser to perform at a slower rate than that identified in its plan of operation, allegedly without objection until the end of the first operating season. The purchaser was required to complete performance within the contract period. That the purchaser elected to perform at a slower rate than detailed in its plan of operation for the first season does not entitle the purchaser to a time adjustment or extension. The Government's silence (not proven by the purchaser, but here assumed) does not alter the contractual limitations on when an adjustment or extension may be granted.

Further, the purchaser alleges that by terminating the contract, the Government failed to act in the Government's best interests. The Government acted in accordance with the clause. The contracting officer considered the fairness of the procurement system (other bidders had unsuccessfully sought to obtain the contract won by the purchaser) (FF 12) and has concluded that the best interests of the Government would not be served by extending the performance time (FF 17).

The purchaser contends that it was entitled to an adequate time extension to complete performance. This assertion is premised on completing performance at its own pace, with the personnel the purchaser deemed sufficient and could afford. This allegation makes meaningless the termination date of the contract, and associated provisions. The purchaser has not demonstrated that existing conditions prevented it from performing. The contract expressly establishes the time for performance and describes the circumstances when an adjustment or extension may be granted. This purchaser has demonstrated no entitlement to the time extension it seeks.

The purchaser's obligations are not altered by his assumption that the Government would readily extend the time for performance. The purchaser reached his assumptions based upon activities other than timber sales, without introducing the terms and conditions of the agreement(s) into the record. The reasonableness of the assumptions is not demonstrated, given the language of this contract.

The purchaser performed at a pace it deemed appropriate, albeit at odds with the rate found in the plan of operation. The Government sought a detailed schedule from the purchaser at the end of the first operating season. The purchaser did not provide a schedule. That the purchaser was unable or unwilling to add personnel to complete performance within the contracted-for period is not attributable to the Government or causes beyond the control of the purchaser. The record reveals no Government impropriety in failing to extend further the termination date.

The Government is entitled to recover under the Failure to Cut clause.

Quantum

As dictated in the Failure to Cut clause, and as supported by the precedent quoted above, the Government is entitled to recover damages as specified in the contract. The record demonstrates that the Government complied with the clause in appraising the remaining timber and making the calculations for its recovery of damages (FF 22).

The purchaser contends that the Government failed to mitigate damages when the Government did not complete a resale and incorrectly concluded that the purchaser would not sign a road use agreement to provide access to the contract site. These assertions are not germane. The Government was not obligated to conduct a resale or to mitigate damages. Moreover, it was the purchaser's

refusal to provide access through a road-use agreement for the resale which led to the cancellation of the resale. The purchaser, not the Government, stood in the way of mitigation, which the Government attempted to accomplish.²

Further, the purchaser asserts that its liability under the contract for failure to cut should be limited to the amount of its performance bond (or equivalent) and the costs for the Government to complete some specific work. Thus, the purchaser seeks to reduce its liability to \$10,400. The contract does not limit the Government's recovery to the amount of the performance bond. Rather, the plain language of the Failure to Cut clause dictates the liability of the purchaser in the event that it fails to cut all timber by the termination date. Unlike the purchaser, the Board does not interpret the contract to limit the purchaser's liability to the amount of the performance bond.

Under the contract, the purchaser is liable to the Government for a total of \$60,702.46. Because the Government maintains that it has \$30,999.01 from letters of credit and deposits, \$29,703.45 remains due from the purchaser.

DECISION

The Board denies this appeal.

JOSEPH A. VERGILIO
Administrative Judge

Concurring:

² The purchaser also raises a non-issue regarding the resale procurement, particularly when a resale contract was not awarded. Applicable regulation, 36 CFR 223.86(a) (1994), specifies that on a resale, the Government is not to consider a bid from the purchaser absent a determination that the acceptance of such a bid is in the public interest. The Government did not determine that the acceptance of a bid by the purchaser would be in the public interest. The purchaser did not seek such a determination or object to its exclusion (FF 20). This disallowance of purchaser's ability to bid on the resale does not constitute a basis to disallow the assessment of damages under the contract. Precision Pine & Timber, Inc., AGBCA No. 99-160-1, 00-2 BCA & 30,942.

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HOWARD A. POLLACK
Administrative Judge

ANNE W. WESTBROOK
Administrative Judge

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